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Finance and Administration Cabinet
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Jonathan Miller
Secretary

Robin Kinney
Executive Director

February 25, 2010

No. 10-01

G.C. Wingo, III
President
Bedrock Contracting, Inc.
3735 Palomar Centre Drive, Suite 150, PMB-119
Lexington, KY 40513

RE: Determination of Protest: RFB 605 1000000504 (Launched Soil Nails).

Dear Mr. Wingo:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Bedrock Contracting, Inc. ("Bedrock") to the award of RFB 605 1000000504 - Launched Soil Nails (the "RFB"). In the protest you contend that RFB Section 1.02 is an inappropriate sole source specification and that RFB Section 2.24 is ambiguous. For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFB on December 22, 2009. The RFB closed on December 29, 2009. Bedrock submitted a bid to the RFB. KYTC opened bids but has not awarded the contract.

By letter dated December 31, 2009 (and filed on January 4, 2010), Bedrock filed a "protest of the award." In its written protest, Bedrock argues that RFB Section 1.02 is an inappropriate sole source specification and that RFB Section 2.24 is ambiguous. On January 25, 2010, KYTC provided a written response to the protest.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration Cabinet (the "Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary. KRS 45A.285. Bedrock was an actual bidder to the RFB so Bedrock has standing to protest the award.

A protest to an award must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. In this case, the protest is directed at terms in the RFB. Accordingly, this protest is a protest to a solicitation. The RFB was issued on December 22, 2009. The protest was received in the Office of the Secretary on January 4, 2010. The protest was filed thirteen days after the RFB was issued and within two (2) calendar weeks. The protest, accordingly, is timely.

Bedrock has asserted two separate grounds of protest:

1. RFB Section 1.02 is an inappropriate sole source specification.

In its letter of protest, Bedrock states:

The writing of the specification limits the bidding to sole-source. Launched Soil Nails are friction nails. However, other methods do exist for installing friction nails, all of which will achieve the 36 ksi or greater strength required by the solicitation.

This is a protest to an express term of the solicitation. A protest to a solicitation should be filed *before* the protestor actually submits a bid or proposal. Once a party submits a bid or proposal to a solicitation and the bids are opened, the protestor then has waived all objections to the solicitation document not previously raised. See 4 C.F.R. §21.2(a)(1) ("Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."); *Parsons Precision Products, Inc.*, Comp. Gen. B-249940, 92-2 CPD 431 ("a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency's statement of the terms and conditions."); *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 583 (Ky. 2003) (The Supreme Court of Kentucky has found federal statutes and decisions to be persuasive in the procurement context.)

Here, Bedrock submitted a bid to the RFB. Accordingly, Bedrock has waived its protest to the solicitation.

2. RFB Section 2.24 is ambiguous.

For its second ground of protest, Bedrock asserts:

A) This specification is ambiguous. A prevailing wage rate schedule was attached to the solicitation; even so, the wording of this section forces the contractor to make his/her own determination of whether or not prevailing wage rates are required. If contractors bid by using non-prevailing wage rates against contractors who do bid by and pay prevailing wage rates, and the state is not in a position to audit/inspect the certified payrolls or require submittal of certified payrolls, the contractors who bid and don't use prevailing wage rates hold a major advantage.

B) A mechanism needs to be in place so that if a project is prevailing wage, the certified payrolls must be submitted weekly as required by other local, state and federal contracts with prevailing rates. This ensures that all parties are in the same playing field.

This protest is a protest to an express term of the solicitation. A protest to a solicitation should be filed *before* the protestor actually submits a bid or proposal. Once a party submits a bid or proposal to a solicitation and the bids are opened, the protestor then has waived all objections to the solicitation document not previously raised. *See* 4 C.F.R. §21.2(a)(1) ("Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."); *Parsons Precision Products, Inc.*, Comp. Gen. B-249940, 92-2 CPD 431 ("a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency's statement of the terms and conditions."); *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 583 (Ky. 2003) (The Supreme Court of Kentucky has found federal statutes and decisions to be persuasive in the procurement context.)

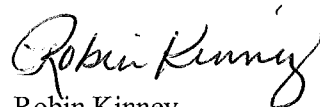
Here, Bedrock submitted a bid to the RFB. Accordingly, Bedrock has waived its protest to the solicitation.

Accordingly, upon review of the record, Bedrock has waived a protest to the terms of the RFB by submitting a bid to the RFB. The protest, therefore, must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation



Robin Kinney
Executive Director
Office of Administrative Services

cc: Peggy Stratton, KYTC
Lindsay Jackson, KYTC